Anderson Co. (ANCO), Div. of Cooper Industries *and* International Association of Machinists and Aerospace Workers, District Lodge No. 72. Case 25–CA–21069

December 19, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 11, 1991, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Anderson Co. (ANCO), Div. of Cooper Industries, Michigan City, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent further contends that the administrative law judge's findings are tainted with bias and prejudice against the Respondent. We find this allegation to be without merit. Our review of the record and the decision of the administrative law judge reveals no evidence that he prejudged the case, made prejudicial rulings, or demonstrated bias.

John N. Petrison, Esq., for the General Counsel.
Stephen A. McCarthy, Esq., of Houston, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On January 7, 1991, the International Association of Machinists and Aerospace Workers, District Lodge No. 72 (the Union or Charging Party) filed a charge against Anderson Co., a Division of Cooper Industries (Respondent).[1]

[1] Counsel for Respondent represents that Respondent's proper name is Anco Div. of Anco, Inc. Both counsel for the General Counsel and Respondent wanted the caption of the case to remain unchanged.

Thereafter, on February 20, 1991, the National Labor Relations Board by the Regional Director for Region 25 issued a complaint alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) on two occasions when it allegedly threatened employees with the loss of their company savings benefit plan if they selected a union as their collective-bargaining representative and when it promulgated, maintained, and enforced a rule prohibiting the discussion of unions, the distribution of union material and the solicitation of union authorization cards.

Respondent filed an answer in which it denies it violated the Act in any way.

A hearing was held before me in Michigan City, Indiana, on May 23, 1991.

On consideration of the entire record, to include posthearing briefs submitted by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material, a corporation organized under, and existing by virtue of, the laws of the State of Delaware.

At all times, the Respondent has maintained its principal office and place of business at Michigan City, Indiana, where it is engaged in the manufacture of automobile wiper blades and related products.

During the past 12 months from the date of the complaint, Respondent sold and shipped from its Michigan City, Indiana facility products, goods and materials valued in excess of $50,000 directly to points outside the State of Indiana and it also during that same period purchased and received at its Michigan City, Indiana facility products, goods, and supplies valued in excess of $50,000 directly from suppliers located outside the State of Indiana.

Respondent admits, and I find, that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

The Union began an organizing campaign among Respondent's employees. During the time that the organizing campaign was going on it is alleged that Respondent twice violated Section 8(a)(1) of the Act. Each alleged violation will be treated separately. The union organizing campaign, however, did not reach the level of an election petition being filed or a demand by the Union for recognition.

B. *Threat of Loss by Employees of Company Savings Benefit Plan*

Respondent maintained a company savings benefit plan. It was called the Cooper Savings Plan or ''Co - Sav'' for short.

The employees whom the Union was seeking to organize were eligible to participate in this company savings benefit plan.

On December 5, 1990, Wilma Rister, division director for employee relations, and three other supervisors conducted a series of approximately seven meetings with employees. It was a periodic update of employee benefits that had been given quarterly for at least the prior 5 years. Rister and the other supervisors had available to them 36 transparencies which were projected onto a screen to be viewed by the employees attending the presentations. Five of the thirty-six transparencies addressed Respondent's savings benefit plan, which again is called the ''Co - Sav'' plan. Basically Respondent matches contributions to the plan made by employees and even if an employee contributes nothing to the plan Respondent will still make a contribution. Rister gave the presentation on the ''Co - Sav'' retirement plan and she states credibly that it took about 12 minutes to present.

It is alleged that Section 8(a)(1) of the Act was violated when Rister showed a transparency, during the union organizing campaign, at these December 5, 1990 meetings, which stated in part:

ELIGIBILITY:

CO - SAV IS AVAILABLE TO ALL EMPLOYEES OF COOPER INDUSTRIES, EXCEPT THOSE WHO ARE MEMBERS OF BARGAINING UNITS. [Jt. Exh. 1n.].

This statement on eligibility to participate in the ''Co - Sav'' program was in capital letters but so were all the rest of the transparencies. Rister also said during her presentation that employees who were members of bargaining units were not eligible to participate in the ''Co - Sav'' program.

Is this a threat in violation of Section 8(a)(1) of the Act? Yes. The law is clear that if an employer threatens employees with a loss of benefits if they select a union as their collective-bargaining representative it violates Section 8(a)(1) of the Act. See *Alpha Cellulose Corp.*, 265 NLRB 177 (1982). In the instant case the employees of Respondent had a benefit, i.e., their eligibility to participate in the ''Co - Sav'' program. At the December 5, 1990 meetings they are told and it is shown them in print that they are not eligible to participate if a member of a bargaining unit. Under the law employees who select a union to represent them continue to enjoy the benefits of employment, such as participation in a pension plan as the ''Co - Sav'' program was, until that benefit is modified by agreement between the employer and the Union or until the parties bargain in good faith to impasse and the employer makes a unilateral change. The transparency in question and the statements of Rister convey to the employees something quite different, i.e, if you select a Union to represent you you lose the ''Co - Sav'' pension plan you now have available to you. This is a clear cut threat, and one which would tend to cause an employee to hesitate in deciding to vote in favor of representation. See *299 Lincoln St.*, 292 NLRB 172 (1988).

The ''Co - Sav'' program was stipulated by counsel for Respondent to be a significant benefit and correctly so because as employee Micheal Zeeze testified his ''Co - Sav'' account was $12,225.04, which is not an insignificant amount of money. Zeeze credibly testified that Rister said at the meeting he attended that if the employees joined a union they would be ineligible to participate in the ''Co - Sav'' retirement plan. Rister claims she never ad-libbed but only read the allegedly objectionable language. It doesn't make any difference, however, since the printed language violates Section 8(a)(1).

The December 5, 1990 meetings each lasted about 1 hour and the ''Co - Sav'' transparencies were 5 out of 36 transparancies and the challenged language was 18 words. But, it was a critical 18 words. Working Americans are vitally concerned about their pensions and language going to the issue of eligibility for pension rights are likely to heard and stand out.

The threat of ineligibity for the ''Co - Sav'' retirement program if the employees selected a union was a significant threat and was not repudiated by Respondent thereafter.

I note that at the time of the rollover from the 401 K retirement plan to the ''Co - Sav'' retirement program in approximately 1988 employees were given a brochure which more accurately reflected the law. In Joint Exhibit 3, an eight-page brochure entitled ''Cooper Savings Plan'' the following language is used in regards to who is eligible for the ''Co - Sav'' plan. The language is as follows: ''However, members of bargaining units whose contracts do not call for participation in the Plan are not eligible.''

The brochure (Jt. Exh. 3) was given out to employees long before the December 5, 1990 meetings, and, therefore, does not furnish Respondent with the defense of repudiation, i.e., don't hold a threat against us because we immediately set the record straight. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

Employees had also prior to the December 5, 1990 meetings been given a copy of a brochure entitled ''Your Individual Account Retirement Plan'' (Jt. Exh. 2), which does not contain the words ''Co - Sav'' but which states as follows:

Eligibility for Membership

If you are an hourly employee of ANCO, not covered by a collective bargaining agreement, you will automatically become a plan member effective on July 1, 1990.

Since the two brochures were distributed to employees *before* the December 5, 1990 meetings they do not render the language spoken and shown by Rister as not objectionable.

Employee Juanita Lynn Taylor corroborated Zeeze. She was at the same meeting as he. Employee Mary Francis Mullins was at a different meeting and Rister showed the transparency on ''Co - Sav'' eligibility and said the employees were not eligible for ''Co - Sav'' if you were in a bargaining unit. A male employee, whose name Mullins couldn't remember, was at the same meeting as Mullins. He asked Rister if Rister was saying that anyone belonging to a bargaining unit could not belong to ''Co - Sav'' and Rister said yes. I found Zeeze, Taylor, and Mullins to be credible and accurate. Rister claims she was asked no questions on eligibility at the meetings. Rister is an honest person but inaccurate on this point.

C. *Did Respondent Promulgate, Maintain, and Enforce a Rule Unlawfully Prohibiting the Discussion of Unions, Distribution of Union Materials and the Solicitation of Union Authorization Cards*

Each workday the employees were given two 5-minute breaks, a 15-minute lunchbreak, and at the end of the shift a 5-minute washup period. Page 10 of General Counsel Exhibit 2, i.e., ''The Anderson Company Hourly Employees Handbook'' provides, in pertinent part, as follows:

WORKING HOURS

> The regular workweek at ANCO is from Sunday to Saturday and normally consists of forty (40) hours. In the course of doing business, job requirements may necessitate overtime work. ANCO provides a lunch period of 15 minutes for factory employees plus two five minute breaks—one in the morning, the other in the afternoon, and a five minute wash up period at the end of the shift. All of this break time is paid.

Several witnesses for the General Counsel credibly testified that there was no prohibition on what employees could do or talk about during the break times referred to in the handbook. In addition, employees were permitted to go to the restroom as needed during the work day. There was, according to several credible witnesses for the General Counsel, no prohibition on what the employees could talk about with one another when in the restroom.

It is hornbook labor law that a no-solicitation or no-distribution policy cannot be discriminatorily promulgated, maintained, or enforced, i.e., you cannot have a bar on union solicitation or distribution and no bar on other employee solicitations or distributions. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

In mid-January 1991 employee Mary Francis Mullins come into work a little early and spoke about the Union with two other women employees in the ladies room. She told one of them, who said she never saw any union literature, that she (Mullins) would leave some in the ladies room for her. Thereafter, Supervisor Tom Mosley asked to speak to Mullins. According to Mullins, whom I. credit, Mosley said ''Mary, the 3:00 to 11:00 shift does not want a Union and I'd advise you not to be bringing any literature or leaving it lay around or handing any of it out.'' (Tr. 56.)

Tom Mosley admits that he found out that Mullins was talking about the Union in the ladies' room. He approached Mullins and, by his own admission, said ''I heard that you were in the bathroom talking Union before work, it's no big thing, it's just, you know, somebody else saying it, and I go—I go you shouldn't be doing that.'' (Tr. 116.) This is the only restriction on what employees may discuss in the restroom. Heretofore, employees were free to discuss anything they wanted in the restroom. There is no evidence that Mullins kept the lady in the restroom and would not let her return to work. Accordingly, to prohibit discussions about the Union and not prohibit discussions about any other matter is discriminatory and a violation of Section 8(a)(1) of the Act.

A second incident occurred around February 21, 1991, when employee Jo Ann Ailes was handing out union literature at the time clock during the 5-minute washup period. Supervisor Ron Krantz, according to Ailes, told her that she should not pass out union literature on company time. She later spoke to Dennis Searinger, a supervisor in employee relations, and he told her the same thing.

It is clear from that portion of the employee handbook set out verbatim in the text above that the 5-minute washup period is break time. Break time is the employee's time and not company time. There was no evidence that in handing union literature Ailes was interfering with employees working or trying to clock in or out. Accordingly, it was unlawful for Respondent to tell her that union literature could not be passed out during the 5-minute washup period at the end of her shift. This was a violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce, and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it threatened its employees with the loss of their company savings benefit plan if they joined, formed, or selected a union as their collective-bargaining agent.

4. Respondent violated Section 8(a)(1) of the Act when it discriminatorily promulgated, maintained and enforced a rule which prohibited an employee from discussing the Union in the restroom and when it prohibited an employee from passing out union literature during the 5-minute washup break period at the end of the shift.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Anderson Co. (ANCO), Div. of Cooper Industries, Michigan City, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threateaning its employees with the loss of their company savings benefits plan if they join, form, or select a union as their collective-bargaining representative.

(b) Prohibiting employees from discussing the Union when in the restroom while allowing them to discuss other matters and from prohibiting employees from handing out union literature while on the 5-minute washup breaktime at the end of the shift.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Post at its facility in Michigan City, Indiana, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.[4]

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[4] General Counsel's motion to reopen the record and to consolidate complaints issued in Cases 25–CA–21069 and 25–CA–21383 is denied. I deny the motion because I believe it will unduly delay final disposition of the allegations in Case 25–CA–21069.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with the loss of their company savings benefit plan if they join, form, or select a union as their collective-bargaining representative.

WE WILL NOT discriminatorily promulgate, maintain, or enforce a rule which prohibits our employees from discussing the Union in the restroom or which prohibits our employees from passing out union literature during the 5-minute washup break period at the end of the shift.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ANDERSON CO. (ANCO), DIV. OF COOPER INDUSTRIES